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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.L., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.L.,

Defendant and Appellant.

E071487

(Super.Ct.No. J268890)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G.

Pace, Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Dawn M. Martin, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court denied defendant and appellant, C.L.'s (Mother), Welfare and Institutions Code section 388¹ petition without granting her an evidentiary hearing and then terminated her parental rights. On appeal, Mother contends the court abused its discretion by denying her an evidentiary hearing. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2016, personnel from plaintiff and respondent, San Bernardino County Children and Family Services (CFS), received a report that Mother tested positive for amphetamines and marijuana when giving birth to A.L. (Minor), born in November 2016. Minor tested positive for marijuana at birth. CFS personnel implemented a safety plan after Mother was released from the hospital in which Mother would begin an outpatient treatment program and drug test. Mother failed to show for two random drug tests. The social worker called the outpatient program and was informed Mother had cancelled intake appointments three times.

On December 30, 2016, CFS personnel filed a juvenile dependency petition alleging Mother had a history of substance abuse which interfered with her ability to parent Minor (b-1). On January 3, 2017, the juvenile court detained Minor and ordered Mother to drug test that day.

In the jurisdiction and disposition report filed on January 19, 2017, the social worker reported that Mother admitted using methamphetamine off and on for

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

approximately three years. She said she had been using marijuana for approximately 16 years. Mother said the last time she used marijuana was when she was six months pregnant with Minor. Mother tested positive for amphetamines on January 3, 2017, and failed to show for another on demand test on January 17, 2017. She believed she had a substance abuse problem and was willing to participate in services.

On January 24, 2017, the court found the b-1 allegation true, removed Minor from Mother's custody, and ordered that she participate in reunification services. In the six-month status review report filed on July 12, 2017, the social worker recommended the court continue Mother's reunification services. The social worker referred Mother to an outpatient treatment provider on December 5, 2016. The social worker also referred her to parenting and individual counseling on January 25, 2017. Mother tested positive for drugs on January 25, 30, and June 28, 2017. Mother failed to show for tests scheduled on February 6, 21, March 1, 23, April 20, 26, May 12, 16, and June 22, 2017.

Mother visited Minor once weekly for two hours. Mother was appropriate during visitation; she demonstrated love and caring with Minor; she also demonstrated that she could parent independently. Mother completed 12 sessions of individual therapy and 12 out of 12 scheduled sessions of a parenting educational program. At the six-month review hearing on July 24, 2017, Mother's counsel requested additional referrals for individual counseling and an inpatient drug program. The court continued Mother's reunification services for an additional six months.

In the January 8, 2018, six-month status review report, the social worker recommended Mother receive an additional six months of services. Mother had tested positive for drugs 20 times between January 2017 and December 2017. She had tested positive once and had five no shows since July 7, 2017. Mother failed to complete the additional parenting education, individual counseling, and outpatient drug program ordered at the last hearing. Since the last hearing, Mother had 20 supervised visits with Minor; she missed two visits; Mother behaved appropriately with Minor at all times.

On January 10, 2018, Mother requested a contested six-month review hearing. The court continued the matter and ordered that Mother drug test that day.

On February 5, 2018, in an information to the court, the social worker reported that she had referred Mother for an outpatient treatment program on July 12, 2017; Mother never completed the intake and assessment process. A therapist reported that Mother had completed one out of 12 recommended individual counseling and parenting sessions. Mother failed to show for the drug test ordered by the court on January 10, 2018, and failed to show for two additionally scheduled tests.

At the contested six-month hearing on February 16, 2018, Minor's counsel requested the court disregard CFS's recommendation and terminate Mother's reunification services. Minor's counsel noted Mother had failed to test negative for drugs even once during the pendency of the juvenile proceedings.

The court noted that it had already granted Mother six months of additional services beyond that which was required by section 366.21, subdivision (e)(3), because Minor was under the age of three years. The court observed: “The failures to test are alarming, given what brought this child before the Court; the failures to complete counseling, so I can’t find any substantial probability of return or substantial compliance with the case plan.” The court terminated Mother’s reunification services and scheduled the section 366.26 hearing.

On June 4, 2018, Mother filed a section 388 petition requesting reinstatement of reunification services or return of Minor to her custody under family maintenance services. Mother maintained circumstances had changed because she engaged in services on her own; had enrolled in an outpatient program since February 22, 2018; had drug tested in the program; participated in weekly Narcotics Anonymous/Alcoholics Anonymous meetings; and completed a parenting class on March 24, 2018. Mother contended the requested change was in Minor’s best interest because Minor would be able to reunify and be with her biological family. Mother tested positive for THC on February 22, 28, and March 9, 2018. However, she tested negative for drugs on March 27, 30, and April 12, 2018. The court summarily denied Mother’s petition, noting it did not state new evidence or a change of circumstances and did not promote the best interest of Minor.

In the June 7, 2018, section 366.26 report, the social worker recommended the court terminate Mother’s parental rights. Minor had been in a nonadoptive foster home

since December 28, 2016; however, a new family had been identified as a concurrent planning home with prospective adoptive parents; placement of Minor with the prospective adoptive parents was expected to occur on June 6, 2018. Mother visited with Minor once weekly for two hours; all visits were deemed appropriate.

In an additional information to the court filed on June 8, 2018, the social worker noted Minor had been placed with the prospective adoptive parents on June 7, 2018.² Minor was adjusting well to the placement. On July 17, 2018, the social worker filed an additional information to the court reflecting the prospective adoptive parents had taken time off work to spend with Minor; they had gone on two vacations with her. The social worker reported Minor was “developing great bonding time” with the prospective adoptive parents. Minor was “adjusting and doing very well at her new placement.”

On August 17, 2018, Mother filed a second section 388 petition requesting reinstatement of reunification services or return of Minor to her custody under family maintenance services. Mother maintained as changed circumstances her completion of outpatient programs, her consistent negative testing for drugs, and her consistent visitation with Minor. Mother had tested negative for drugs on June 15 and 28, 2018. Mother attached a certificate of completion of “Loving Solutions Parenting Classes” dated July 10, 2018.

² Later documentation reflected Minor’s placement with the prospective adoptive parents occurred on June 6, 2018.

The court summarily denied the petition the same day noting, again, that the petition did not state new evidence or a change of circumstances and did not promote the best interest of Minor. The court specifically indicated that “Minor was removed [at] 1 month old [and] mother hasn’t parented the child” The court continued the section 366.26 hearing on June 18, July 18, and August 20, 2018.

On October 10, 2018, Mother filed a third section 388 petition requesting reinstatement of reunification services, liberalized visitation to include unsupervised visitation, and an increase in the duration and frequency of visitation. Mother alleged she had given birth to a second child and tested clean at the birth. Since the testing reflected in the previous petitions, Mother had tested clean on September 10, 2018. Mother declared she no longer used drugs and had been clean for “the last year or so.” She was enrolled in an aftercare program and an additional parenting program. Mother maintained the requested change was in Minor’s best interest because Minor was “deeply bonded” to Mother and would benefit emotionally from having extended contact with her new sibling.

At the section 366.26 hearing on the same date, the court noted Mother had just filed the section 388 petition that morning. The court summarily denied the petition: “I also just denied Mother’s [section] 388 [petition] on August 17th. And I specifically wrote on there that the minor was removed at one month old, and mother hasn’t parented the child since. The same would apply to this. [¶] Not only is the motion untimely, but I

do not believe that it would be in the minor's best interest to grant any [section] 388 [petition]" The court terminated Mother's parental rights.

II. DISCUSSION

Mother contends the court abused its discretion by not granting her an evidentiary hearing on her third section 388 petition because she had demonstrated changed circumstances. CFS maintains Mother has waived the issue by failing to address the basis for the court's denial of her section 388 petition: that Mother failed to establish a prima facie case that the requested change was in Minor's best interest. In other words, since the court did not render a finding that Mother had not demonstrated a change of circumstances, she thereby waives any contention the court erred in summarily denying her section 388 petition by failing to address the best interest prong on appeal.

We hold that Mother has waived any challenge to the court's ruling on her third section 388 petition because she fails to challenge the basis for the court's ruling on appeal. Even assuming arguendo that we could address the merits of Mother's claim, we hold that Mother failed to demonstrate a prima facie case of change of circumstances or that the requested change was in Minor's best interest.

A. *Waiver*

CFS maintains mother waived the issue that the court erred in denying her an evidentiary hearing on her third section 388 petition by failing to address on appeal the basis for the court's denial of her section 388 petition: that Mother failed to establish a prima facie case that the requested change was in Minor's best interest. Mother

complains that the juvenile court’s basis for denying her petition is not “legally cognizable” because “[t]here is no way that a natural mother can fully parent her child while the child is under a removal order.”³ Mother also maintains she “made an adequate showing that it would have been in the best interests of the children to order” her requested change. We hold Mother has waived the point by not supporting the issue with argument and authority.

“The juvenile court’s judgment is presumed to be correct, and it is appellant’s burden to affirmatively show error. [Citation.] To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, ‘it is deemed to be without foundation and requires no discussion by the reviewing court.’ [Citations.] Hence, conclusory claims of error will fail.” (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

The sole basis for the court’s order denying Mother’s third section 388 petition was that Mother failed to demonstrate a *prima facie* case that the requested relief would be in Minor’s best interest. The court expressly supported its ruling by stating: “I also

³ We acknowledge that this basis alone is problematic as it would effectively render all parents who had children removed at or near birth ineligible for section 388 relief. In fact, an exception to termination of parental rights may apply where the parent establishes an emotional bond with the minor which would be detrimental to terminate. Establishment of such a bond is typically, but not necessarily, demonstrated through day-to-day contact. In other words, custody is not required to establish such a bond. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.) Nevertheless, as we shall discuss below, since Mother has waived the issue, any error is harmless. Moreover, other evidence supports the court’s ruling.

just denied Mother's [section] 388 [petition] on August 17th. And I specifically wrote on there that the minor was removed at one month old, and mother hasn't parented the child since. The same would apply to this. [¶] Not only is the motion untimely, but I do not believe that it would be in the minor's best interest to grant any [section] 388 [petition]" The court's ruling refers to its previous ruling on Mother's second section 388 petition which the court denied both because Mother failed to demonstrate a prima facie case of change of circumstances and that the requested change would be in the best interest of Minor. On the latter point, the court wrote: "Minor was removed [at] 1 month old [and] mother hasn't parented the child"

Yet Mother's sole basis for challenging the court's ruling on the best interest prong are her statements that the juvenile court's reason for denying her petition is not "legally cognizable" because "[t]here is no way that a natural mother can fully parent her child while the child is under a removal order" and that she "made an adequate showing that it would have been in the best interests of the children to order" her requested change. On the best interest prong, Mother does not provide any "meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error." (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.) Mother spends the vast majority of her brief arguing that the court erred in failing to find that she had made a prima facie showing of a change of circumstance, a ruling the juvenile court did not make. Thus, because Mother's assertion that she made an adequate showing that the requested relief was in Minor's best interest is made without argument and authority,

Mother has waived the issue. Moreover, because the best interest prong was the only basis for the juvenile court's order denying her petition, Mother's waiver of the issue leaves this court with nothing to review. Therefore, the juvenile court's order must be affirmed.

B. Best Interest

Assuming arguendo, that Mother could challenge the juvenile court's finding that the requested relief was not in Minor's best interest, we hold the juvenile court acted within its discretion.

"To prevail on a section 388 petition, the moving party must establish that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. [Citation.]" (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.)

"Under section 388, a party 'need only make a prima facie showing to trigger the right to proceed by way of a full hearing.' [Citation.] The prima facie showing is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.] In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. [Citation.] The petition must be liberally construed in favor of its sufficiency. [Citations.]" (*In re J.P.* (2014) 229 Cal.App.4th 108, 127.)

"The factors to be considered in evaluating the child's best interests under section 388 are (1) the seriousness of the problem that led to the dependency and the reason for any continuation of that problem; (2) the strength of the child's bond with his or her new

caretakers compared with the strength of the child's bond with the parent; and (3) the degree to which the problem leading to the dependency may be easily removed or ameliorated, and the degree to which it actually has been. [Citation.]" (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 224.) "We review a summary denial of a hearing on a modification petition for abuse of discretion. [Citation.] Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]" (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

Here, Mother only had custody of Minor for the first, approximately one and a half months of her life. Mother tested positive for amphetamines and marijuana at Minor's birth; Minor tested positive for marijuana. During the period in which Mother had custody of Minor, Mother failed to show for drug tests and enroll in the outpatient drug program required of the safety plan under which Minor was released to Mother. Mother tested positive for amphetamines days after CFS took Minor into protective custody. During the ensuing year, Mother tested positive for drugs more than 20 times, including actual tests and tests which counted as positive due to Mother's failure to show. Mother failed to complete court-ordered parenting education, individual counseling, and an outpatient drug program.

Mother consistently visited with Minor and the visits were referred to as appropriate, loving, and caring. Nonetheless, by the time of the court's ruling on Mother's third petition, the nearly two-year-old Minor had been in the prospective

adoptive parents' custody for more than four months, approximately three times as long as she had been in Mother's custody. The prospective adoptive parents had taken time off of work in order to spend more time with Minor; they had gone on two vacations with her. Minor was "developing great bonding" with the prospective adoptive parents. Minor was "adjusting and doing very well at her new placement." Thus, the court acted within its discretion in determining that Minor's best interests were better served by remaining in the custody of the prospective adoptive parents with whom she had lived longer than Mother, who had a protracted substance abuse problem.

C. Change of Circumstances

Assuming arguendo that Mother could raise the issue that the court erred in determining she did not demonstrate a prima facie case of a change of circumstances, a finding the juvenile court did not make with respect to her third petition, we hold that the court acted within its discretion.

"A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Chronic substance abuse is generally considered a serious problem and, therefore, is less likely to be satisfactorily ameliorated in the brief time between termination of services and the section 366.26 hearing. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528, 531, fn. 9 ["It is the nature of addiction that

one must be ‘clean’ for a much longer period than 120 days to show real reform.”]; *In re Amber M.* (2002) 103 Cal.App.4th 681, 686 [no abuse of discretion in denying § 388 petition where mother established only a 372-day period of abstinence]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423 [“seven months of sobriety since . . . relapse . . . , while commendable, was nothing new.”]; *In re Ernesto R., supra*, 230 Cal.App.4th at p. 223 [“To support a section 388 petition, the change in circumstances must be substantial. [Citation.] [A parent’s] recent sobriety reflects ‘changing,’ not changed, circumstances. [Citation.]”].)

Here, Mother produced evidence that, at best, she had been sober for six months.⁴ Yet Mother declared she had been clean “[f]or the last year or so.”⁵ Mother had completed an outpatient drug program and enrolled in an aftercare program. However, Mother had admitted using methamphetamine for at least three years and marijuana for approximately 16 years. Mother believed she had a substance abuse problem. To the extent the juvenile court could be said to have found that Mother had not made a prima facie showing of changed circumstances, the court acted within its discretion because six months of sobriety was simply not long enough when considered in context with Mother’s substance abuse history, particularly her continued use during the pendency of this case.

⁴ Mother had three positive drug tests even after termination of her reunification services.

⁵ Mother produced negative test results beginning with a test on March 27, 2018, and ending with a test on September 10, 2018.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.